RECEIVED
JAN 0 3 2002
LDC

(45)

Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

No. 00-1777

In The

Supreme Court of the United States

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

v.

DORRIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE HANNA PERKINS SCHOOL, ET AL., PETITIONERS

Of Counsel:

DAVID J. HESSLER
NATHAN E. HESSLER
WEGMAN, HESSLER & VANDERBURG
6055 Rockside Woods Boulevard
Suite 200
Independence, Ohio 44131

DAVID J. YOUNG
(Counsel of Record)
MICHAEL R. REED
PAUL A. WOLFLA
SQUIRE, SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2700

Counsel for Petitioners Hanna Perkins School, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

57pp

QUESTION PRESENTED

Whether the Ohio Pilot Scholarship and Tutorial Program, which provides scholarship and tutorial grants to a broad class of public and nonpublic school, low income families, comports with the Establishment Clause of the First Amendment where the grant recipients are defined without reference to religion and where the identity of the public, secular or religiously affiliated school of attendance is the result of the genuinely independent and private choice of individual families participating in the Program.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners:[1]

1. In No. 00-1777: Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Luther Memorial Association of Cleveland and Delories Jones were intervening Defendants-Appellants in the courts below and are Petitioners herein. None of the school entity Petitioners has a parent company or publicly held company owning 10% or more of their stock.

2. In No. 00-1751: Dr. Susan Tave Zelman; the State of Ohio through its General Assembly, Governor and other agents; and Saundra Berry were Defendants-Appellants in the courts below.

3. In No. 00-1779: Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock were intervening Defendants-Appellants in the courts below.

Respondents:

1. Doris Simmons-Harris, Marla Franklin, and Steven Behr were Plaintiffs-Appellees in the courts below.

2. Sue Gatton, Mary Murphy, Michael Debose, Cheryl Debose, Glenn Altschuld, and Deidra Pearson were Plaintiffs-Appellees in the courts below.

---

[1] The petitions for writs of certiorari in Nos. 00-1751, 00-1777 and 00-1779 were granted, and the cases, have been consolidated. However, the petition for a writ of certiorari in No. 00-1779 was granted limited to Question 1 presented by the petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. Background Of The Ohio Program	3
A. The Ohio Program Is Enacted In Response To An Unprecedented Educational Crisis In Cleveland's Public Schools	3
B. Characteristics Of The Ohio Program	5
1. Diversification In Alternative Schools	6
2. Secular Educational Standards Imposed Upon State Accredited Alternative Schools	8
3. Secular Educational Achievements In Schools Participating In The Ohio Program	10
II. Respondents' State And Federal Constitutional Challenges To The Program	12
SUMMARY OF THE ARGUMENT	13
ARGUMENT	14

TABLE OF CONTENTS – Continued

Page

I. The Sixth Circuit Acknowledged, But Failed To Properly Apply, The Prevailing First Amendment Law 14

II. The Sixth Circuit Ignored The Roles That Neutrality And Private Choice Played In The Design And Implementation Of The Ohio Program ... 20

A. Program Parents Whose Children Receive Grants Have A Wide Range Of Choices And Are Able To Freely Choose The Option Best Suited To Address Their Children's Educational And Remedial Needs..... 20

1. Incentives For Adjacent Public School District Participation 22

2. Lower Scholarship Grants Do Not Favor Religiously Affiliated Non-Public Schools 23

3. The Program Requires The State Superintendent To Award Tutorial Assistance Grants To A Number Of Students Equal To The Number Who Receive Scholarships 26

4. The Parents Of The Scholarship Pupils Have Evaluated Alternatives And Chosen The One They Perceive Best Suited Their Children's Educational Or Remedial Needs..... 27

5. The Majority Of Pupils Benefiting Under The Ohio Program Attend Schools Without Religious Affiliation.. 34

III. *Nyquist* Should Not Control The Constitutional Analysis Of The Ohio Program 45

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I 1, 2, 13, 50

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 17, 49

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) ..... *passim*

Good News Club v. Milford Cent. School, 121 S. Ct. 2093 (2001) 19, 20, 50

Lemon v. Kurtzman, 403 U.S. 602 (1971) 14, 17

Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530 (2000) 17, 18, 50

Mueller v. Allen, 463 U.S. 388 (1983) ... 15, 17, 48, 49, 50

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) 16, 19, 27, 50

Simmons-Harris v. Goff, 711 N.E. 2d 203 (Ohio 1999) 47

Simmons-Harris v. Goff, 1997 Ohio App. LEXIS 1766 (Franklin Cty. May 1, 1997) 12

Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) ..... *passim*

Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) 1, 3, 13

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 15, 16, 17, 50

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 16, 17, 49, 50

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. §1254(1) 1

Ohio Revised Code §3313.602(B) 35

Ohio Revised Code §3313.776(C) 5

Ohio Revised Code §§3313.974-3313.979 ..... 1, 2, 4

Ohio Revised Code §3313.976(A) 5

Ohio Revised Code §3313.976(A)(4) 5, 6, 47

Ohio Revised Code §3313.976(A)(8) 6, 48

Ohio Revised Code §3313.977(A)(1)(c) 6

Ohio Revised Code §3313.977(A)(1)(d) 5

Ohio Revised Code §3313.978(B) 5, 6, 26

Ohio Revised Code §3313.979 ..... 21, 34

Ohio Revised Code §3314.01, *et seq.* 4

OHIO LEGISLATIVE MATERIALS

121st General Assembly, A.M. Sub. HB 117 3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 234 F.3d 945 (6th Cir. 2000), and appended at pages 1a-62a of the Appendix to the Hanna Perkins School, et al., Petition for a Writ of Certiorari ("Hanna Perkins Pet. App.") at pp. 1a-62a. The order of the United States Court of Appeals for the Sixth Circuit denying the petitions for rehearing and suggestions for rehearing *en banc* is appended to the State's Petition for a Writ of Certiorari at App. pp. 166a-167a. The opinion of the district court is reported at 72 F. Supp. 2d 834 (N.D. Ohio 1999) and is also appended to the State's Petition for a Writ of Certiorari at App. pp. 61a-126a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 11, 2000. Petitioners' timely petition for rehearing and suggestion for rehearing *en banc* was denied on February 28, 2001. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " U.S. Const. Amend. I. Due to the length of the statutory provisions pertinent to this case, the text thereof is set forth at Hanna Perkins Pet. App. pp. 63a-79a. Those provisions are Ohio Revised Code ("R.C.") §§3313.974-3313.979.

STATEMENT OF THE CASE

Petitioners herein fall into two categories: (1) religious and secular schools registered to participate in the Ohio Scholarship and Tutorial Program (the "Ohio Program"), R.C. §§3313.974-3313.979, and (2) parents whose children have been awarded scholarships and are enrolled in alternative schools in the City of Cleveland, Ohio.[2] The Ohio Program has been in existence in essentially the same form since 1995. It benefits thousands of underprivileged children (selected by lottery and without reference to religion) by enabling their parents to independently choose a non-public school best suited to their child's educational needs or to select tutorial assistance while remaining in the public schools.

The Sixth Circuit held that the Ohio Program violates the Establishment Clause of the First Amendment. The effect of the decision below, if not reversed, will be (1) to reinstate financial barriers to educational choice for low

---

[2] As noted above, three separate writs of certiorari in Nos. 00-1751, 00-1777, and 00-1779 have been consolidated by this Court. Petitioners herein (No. 00-1777) include the following: **Hanna Perkins School**, a private, non-sectarian school which receives funding from various sources including The United Way of Cleveland; **Westpark Lutheran School Association**, supported by Lutheran congregations, which offers alternative educational experiences at four facilities serving Cleveland's Westpark community for children in grades K-8; **Luther Memorial Association of Cleveland, Ohio, Inc.**, sponsored by three Lutheran congregations and which offers educational opportunities to children in K-8 in the Cleveland area; **Our Lady of Peace School**, affiliated with Our Lady of Peace Catholic Parish in Cleveland, which works in conjunction with parents in the community in offering an alternative educational opportunity for children in grades K-8; and **Ms. Ivy Chambers, Ms. Carol Lambert, and Ms. Delories Jones**, adult residents of Cleveland, Ohio, eligible on the basis of low family income to participate in the Scholarship Program and whose children are receiving scholarship grants under the Program.

income, inner-city public school Cleveland parents, (2) to discriminate against schoolchildren solely on the basis of their families' constitutionally protected decision to choose a state-accredited education with religious sponsorship, and (3) to abolish a state program of neutral educational assistance designed to benefit a broad class of low income citizens defined without reference to religion.

I. BACKGROUND OF THE OHIO PROGRAM

A. The Ohio Program Is Enacted in Response to an Unprecedented Educational Crisis in Cleveland's Public Schools.

Judge Solomon Oliver, Jr., in rendering the District Court opinion below, acknowledged that the Ohio Program was enacted in response to an unprecedented public school crisis:

> In 1995 the Ohio Legislature enacted a pilot scholarship program to address an educational crisis in Cleveland's public schools in the wake of a U.S. District Court-ordered takeover of the administration of the Cleveland City School District (the "District") by the State. * * * The program has two components: a scholarship program to enable students to attend "alternative schools" ("Voucher Program" or "Program"); and a tutorial program for children attending the Cleveland Public Schools ("Tutorial Program").

72 F. Supp. 2d at 836; R. 131, Order, p. 2; State Pet. App. p. 62a.

Pursuant to a mandate by the Ohio General Assembly, Jim Petro as Auditor of the State of Ohio was required to conduct a thorough and expedited audit of the Cleveland Public Schools. Ohio 121st General Assembly, A.M. Sub. HB 117, p. 826. The Cleveland Public School Performance Audit ("Performance Audit") was

released by the Auditor of the State on March 15, 1996. *See http://www.auditor.oh.us.* In his Executive Summary, the Auditor found that the Cleveland City School District ("Cleveland District") "is in the midst of a financial crisis that is perhaps unprecedented in the history of American Education. . . . As proven by the District's proficiency scores and high drop out rate, the educational delivery system is not accomplishing its purpose." Performance Audit, Executive Summary at 2-1. One of the troublesome issues noted by the Auditor was that "the District's ninth grade proficiency passage rate is only nine percent and the annual drop out rate is 9.1% per year." *Id.* at 2-3.

The Ohio Program was first adopted by the Ohio General Assembly on June 28, 1995 and signed by then Governor Voinovich on June 30, 1995. R.C. §3313.974-979. In an effort to alleviate the academic disadvantages being suffered by low income and minority pupils in the Cleveland District, the General Assembly sought help from immediately available sources such as neighboring public school districts, tutorial service organizations, non-public schools without religious affiliation, religiously affiliated non-public schools, and later community schools. *See* R.C. §§3314.01, *et seq.* Although the community school program was not adopted until 1997, the Auditor's Performance Audit recommended the enactment of a charter school law in Ohio as an additional appropriate response to the Cleveland District crisis. In this regard, the Performance Audit states:

> In response to these ongoing governance problems as well as other barriers to resolving the District's financial condition such as the desegregation orders and labor contracts, the Auditor of State recommends the following:
>
> . . . .
>
> 5. Enact a charter school law in Ohio. . . . The charter school concept may be particularly appealing in Cleveland for two reasons: 1) The District educates a large percentage of

> disadvantaged students who could be specifically targeted in a community school; and 2) The District offers a broad range of community resources available for sponsoring a charter school.

Performance Audit, Executive Summary, at 2-6. Although Ohio's community school legislation is codified separately from the Pilot Scholarship and Tutorial Program challenged by Respondents, the two enactments are part and parcel of the same effort to remediate Cleveland's failing public schools.

B. Characteristics of the Ohio Program.

The prominent features of the Ohio Program are as follows:

1. Special tutorial assistance grants for public school children in a number equal to the alternate choice scholarship grants awarded to pupils selecting alternate schools. R.C. §3313.978(B).
2. Basic scholarship grants not to exceed the lesser of the tuition charges of the alternative school or $2,500. The actual grants are equal to 75% or 90% of the basic grant amount depending upon the poverty level of the recipient. R.C. §3313.976(A)(4) and R.C. §3313.977(A)(1)(d).
3. Scholarship choice grants for low-income pupils that may be utilized at:
   a. Non-public schools without religious affiliation. R.C. §3313.976(A).
   b. Religiously affiliated non-public schools. R.C. §3313.976(A).
   c. An adjacent public school that charges out-of-district tuition.[3] R.C. §3313.976(C).

---

[3] No adjacent public school district has elected to participate during the pendency of this constitutional challenge.

4. Increased parental involvement in their children's education by permitting ten percent (10%) of alternate school tuition for scholarship pupils to be paid through in-kind parental services. R.C. §3313.976(A)(8).
5. Admission preference for low-income disadvantaged pupils to insure that those with greatest need will have an opportunity to select a preferred registered non-public school. R.C. §3313.977(A)(1)(c).
6. Restrictions against tuition increases for low-income families. R.C. §3313.976(A)(8).
7. Prohibition against admission restrictions based on religion. R.C. §3313.976(A)(4).

Three thousand seven hundred and sixty-one students received scholarship grants during the 1999-2000 school year. 234 F.3d 949. This means that an equal number of public school pupils became entitled to receive tutorial assistance grants during the same period of time. R.C. §3313.978(B).

In addition to these core features, there are three significant aspects of the non-public schools that have agreed to participate in the Ohio Program: (1) the diversity of schools and students in the Ohio Program, (2) the secular educational standards imposed upon all non-public schools in Ohio, and (3) the secular educational achievements obtained by certain non-public schools participating in the Ohio Program.

1. Diversification In Alternative Schools

Since the Ohio Program primarily addresses the needs of inner-city, public school pupils, it is not surprising that religiously affiliated alternative schools enroll high percentages of minority pupils not of the same faith. For example, even though Intervening Petitioner, Our Lady of Peace School, is affiliated with the Catholic church:

> 99% of our children are minority pupils. At least one-half of the families are at or below poverty level. 85% of the pupils are not of the Catholic faith. * * * Approximately 50% of the teachers at our institution are not of the Catholic faith.

R. 34, Hanna Perkins Opp. to TRO Exh. 1, pg. 1.

Fifty-six non-public schools are registered to participate in the Ohio Program.[4] Forty-six of these schools are religiously affiliated. 234 F.3d at 949. Throughout this litigation, Respondents have consistently referred to the large percentage of religiously affiliated schools participating in the Ohio Program to support their Establishment Clause claims, and have attached extracts from mission statements of religiously affiliated schools to support assertions of pervasive sectarianism in these schools. Petitioners herein did indeed stipulate that the Handbooks and Mission Statements "are authentic, speak for themselves, have been made available to the parents of the Scholarship students and are not false or misleading." R. 82, Stipulation. However, the Mission Statements and Handbooks do not specifically address the Ohio Program, the services provided to pupils under the Ohio Program or the manner in which these children are integrated into the schools. In light of these matters that simply are not reflected in the mission statements and handbooks, the second paragraph of the Stipulation reads, "the Defendants reserve the right to produce evidence concerning the students and teachers, demographics, secular educational mission and achievements, and Scholarship pupil enrollment at these schools." *Id.*

It was pursuant to the latter portion of the Stipulation that Petitioners herein produced 57 affidavits relating to the students and teachers involved in the Ohio

---

[4] Sixty percent of the enrollees in alternative schools are from families at or below the poverty level. 234 F.3d at 949.

Program, the program demographics and the secular educational mission and achievements at the alternative schools. For example, the demographics of the more diversified religiously affiliated schools reflect:

School Name	Percentage of Enrolled Pupils not of the Same Religious Faith as the Sponsor
Our Lady of Peace	92.79%
St. Thomas/St. Philip	96.30%
St. Joseph Collinwood	93.48%
Archbishop-St. Timothy	92.34%
Archbishop-St. Catherine	90.29%
St. Adalbert	91.82%
Archbishop-St. Henry	89.93%
St. Francis	88.81%
St. Agatha-Aloysius	86.67%
Holy Redeemer	72.00%

R. 39 S.J. Memo Exh. 2 pg. 2. Although these statistics do not reveal the full diversity of religious beliefs held by the scholarship pupils and their families, they do show that the schools are not being filled with adherents of the same faith.

2. Secular Educational Standards Imposed Upon State Accredited Alternative Schools

The State of Ohio regulates extensively the content of the secular educational curriculum and other core operational functions in private and religiously affiliated alternative schools. The following state statutory sections and regulations address such things as minimum secular educational standards, certification of teachers, courses to be taught, proficiency testing, chartering of the schools, annual reports by the schools, minimum attendance and

school year requirements, non-public diploma and graduation requirements, and post-secondary enrollment options:

- Minimum standards for all elementary and secondary schools in the State [R.C. §3301.07(D) and §3321.07]
- Rules on racially nondiscriminatory policies and practices for non-public schools [OAC §3301-39]
- Certification of teachers in nontax-supported schools [R.C. §3301.071]
- Statewide Proficiency Tests and diploma requirements [R.C. §3301.0710; OAC §3301-13]
- Classifying and chartering of schools [R.C. §3301.16]
- Rules for operating preschool programs [R.C. §§3301.50-59; OAC §3301-37]
- Requirement for annual report by private schools [R.C. §3301.14]
- Operating innovative education pilot programs [R.C. §3302.07; OAC §3301.46]
- Attendance/minimum school year [R.C. §3313.48 and §3321.07]
- High school graduation requirements [R.C. §3313.603]
- Non-public school diploma requirements [R.C. §3313.612]
- Health/immunizations/pupil records [R.C. §3313.67]
- Notifications to fulfill requirements of Missing Children Informational Program [R.C. §3313.672]
- Certification of ADM (average daily membership of pupils) [R.C. §3317.03]
- Educator licenses [R.C. §§3319.22-3319.312; OAC §3301-24]
- Employee criminal record checks [R.C. §3319.39; OAC §3301-20]

All non-public schools that have elected to participate in the Ohio Program are subject to the foregoing standards and regulatory provisions.

3. Secular Educational Achievements in Schools Participating in the Ohio Program

Published information concerning the extent to which alternative schools have satisfied the regulatory requirements set forth above is readily available. For example, the 1999 Ohio proficiency test results compare Diocese of Cleveland alternative schools, State of Ohio public schools, and Cleveland District schools:

RESULTS OF THE MARCH, 1999 OHIO PROFICIENCY TEST (taken by pupils during 8th grade)					
	Writing	**Reading**	**Math**	**Citizenship**	**Science**
Diocese of Cleveland	94%*	95%	75%	88%	82%
State of Ohio Public Schools	86%	84%	61%	71%	69%
Cleveland Public School District	57%	57%	22%	40%	28%

* 94% of the eighth graders in the Diocese of Cleveland passed the writing test.

A chart reflecting how the Diocese of Cleveland pupils scored in relation to their national public and non-public school counterparts is as follows:

IOWA TEST OF BASIC SKILLS (taken in 1999)

	Grade 3	Grade 5	Grade 7
Reading	91%*	93%	95%
Language	89%	90%	95%
Mathematics	89%	90%	93%
Social Studies	91%	88%	95%
Science	88%	87%	94%
Math Computation	89%	90%	93%

* 91% of the students in the third grade in the Diocese of Cleveland scored in the top 25% on the reading test.

R. 39 S.J. Memo Exh. 2 pg. 2, 3.

These secular educational achievements are reflected by standardized tests which bear no relationship to religious membership, beliefs or practices. The numbers speak for themselves. However, statistics reflecting the outstanding secular education and citizenship achievements at alternative schools are not submitted to undermine in any way the commendable efforts of the Cleveland District to educate alarmingly high numbers of educationally and financially disadvantaged children. The Cleveland District continues its admirable efforts to improve educational opportunities for its children. Indeed, lessons learned from the Ohio Program may well foster continued improvement in both public and alternative school systems. The Ohio Program has not adversely affected public schools. The Cleveland District receives additional state funding for its former pupils who elect to

enroll in the Ohio Program alternative schools. R.C. §3317.03(I)(2). Instead, the Ohio Program has provided information helpful to both systems.

II. RESPONDENTS' STATE AND FEDERAL CONSTITUTIONAL CHALLENGES TO THE PROGRAM

Respondents initially presented their federal (and state) Establishment Clause challenges to the Ohio Program in the state courts of Ohio. The Franklin County Ohio Common Pleas Court upheld the constitutionality of the Ohio Program. The Tenth District Court of Appeals reversed, finding that the legislation violated the Establishment Clause. *Simmons-Harris v. Goff*, 1997 Ohio App. LEXIS 1766 (Franklin Co., May 1, 1997). This appellate decision was reviewed by the Ohio Supreme Court which reversed in part, but upheld the constitutionality of the Ohio Program under the Ohio and federal Religion Clauses. *Simmons-Harris v. Goff*, 86 Oh. St. 3d 1 (1999). Specifically, the Program was stricken as a violation of §15(D), Article 2 of the Ohio Constitution which requires single subject legislation. The Ohio Supreme Court also invalidated one of the pupil selection criteria on Establishment Clause grounds.

After the Ohio General Assembly re-enacted the Ohio Program as single subject legislation and with the deletion of the objectionable pupil selection criterion, Respondents filed their new constitutional challenge in the U.S. District Court for the Northern District of Ohio, Eastern Division, on August 24, 1999. Judge Solomon Oliver, Jr. granted a preliminary injunction against the Ohio Program. *Simmons-Harris v. Zelman*, N.D. Ohio 1999, 54 F. Supp. 2d 725. However, this Court on November 5, 1999, issued a full stay of the preliminary injunction. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999). Thereafter, the District Court granted summary judgment in favor of

Respondents and enjoined administration of the Ohio Program in its entirety. The District Court stayed its injunction pending appellate review by the Sixth Circuit. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999).

On December 11, 2000, a divided panel of the Sixth Circuit affirmed the District Court's permanent injunction, and held that the Ohio Program violated the Establishment Clause. *Simmons-Harris v. Zelman*, 234 F.3d 945 (2000). The majority also concluded that this Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) controlled.

SUMMARY OF THE ARGUMENT

In rigidly adhering to *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Sixth Circuit failed to take into account the neutral design of the Ohio Program, as well as the true choices that the Ohio Program allows the scholarship pupils and their families to make. A thorough examination of the Ohio Program in its entirety and proper context reveals that it does not define its aid recipients by reference to religion. Such an examination also shows that the majority of pupils benefiting under the Ohio Program actually attend schools without a religious affiliation. In any event, the scholarship or tutorial grants made available by the Ohio Program ultimately flow to the public schools, secular non-public schools or religiously sponsored schools only as a result of the genuinely independent and private choices of parents of the aid recipients. Viewed in its proper light, and in light of post-*Nyquist* Establishment Clause jurisprudence, the Ohio Program fully comports with the First Amendment.

ARGUMENT

I. THE SIXTH CIRCUIT ACKNOWLEDGED, BUT FAILED TO PROPERLY APPLY, THE PREVAILING FIRST AMENDMENT LAW

The majority opinion of the Sixth Circuit viewed this Court's ruling in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), as central to its conclusion that the Ohio Program violates the Establishment Clause. The Sixth Circuit's opinion does not withstand careful scrutiny. *Nyquist* involved a New York statute that provided three types of aid to private elementary and secondary schools: direct grants for maintenance and repair of facilities at private schools, a tuition grant program for low-income parents, and a tuition tax deduction program for parents who did not qualify for the tuition grant program. *Id.* at 762-65. A majority of six Justices concluded that all three forms of aid violated the Establishment Clause. *Id.* at 798. The Court's decision did not turn upon the "secular purpose" prong of the three-part *Lemon* test.[5] Rather, the majority reasoned that the government aid at issue in *Nyquist* advanced religion in violation of the second prong. *Id.*[6]

This Court's Establishment Clause jurisprudence has not remained static since *Nyquist*. In fact, much has changed since *Nyquist*. Indeed, this Court has permitted greater accommodation in the relationship between state and religion. This shift actually finds its roots in footnote

---

[5] The three requirements under the *Lemon* test are: (1) a secular legislative purpose; (2) a primary effect that neither advances nor inhibits religion; and (3) the absence of excessive governmental entanglement with religion. Any statute or governmental policy attacked on Establishment Clause grounds must satisfy all three requirements to be declared constitutional. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[6] The majority in *Nyquist* merely commented in dicta on the third prong of the *Lemon* test – "excessive entanglement."

38 of *Nyquist*, in which the Court stated that it was not deciding "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 783, n. 38.

In the wake of footnote 38, the Minnesota legislature developed a tax deduction program in 1982 similar to the program found to be unconstitutional by the *Nyquist* Court, but which allowed parents a deduction for expenses incurred in providing tuition, textbooks, and transportation for children in either public or private schools. Ten years after *Nyquist*, the Court declared the Minnesota program constitutional in *Mueller v. Allen*, 463 U.S. 388 (1983). The Court reasoned that "the historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefits, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400. The decision in *Mueller* upheld the Minnesota legislation notwithstanding the fact that 95% of the private schools in Minnesota had religious affiliation and the overwhelming majority of beneficiaries under the tax deduction scheme were parents whose children attended these schools. *Id.* at 391. Percentages did not control – independent choice did.

Several subsequent cases have both buttressed and refined the reasoning of the *Mueller* decision, and, in turn, have widened the gap between *Nyquist* and current Establishment Clause jurisprudence. In a unanimous 1986 decision, *Witters v. Washington Department of Services*, 474 U.S. 481 (1986), the Court determined that the Establishment Clause does not prohibit the provision of vocational rehabilitation services to aid a blind student attending a

Christian college. The Court reasoned that, because the aid is given to the student who then transmits it to the public or private educational institution of the student's choice, the money is not in the form of impermissible direct state subsidy of religion. *Id.* at 488-89. Inherent in the design of the challenged aid program in *Witters* was the possibility that the religious institution might use the assistance provided through the student for *any* purpose. *Id.* at 489. Yet the Court noted that there was no special incentive for the student to use the money at religious institutions. *Id.* at 488.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court reviewed an Establishment Clause challenge to a school district's practice of providing a sign-language interpreter under the federal Individuals with Education Disabilities Act ("IDEA") to a deaf student enrolled in a Catholic high school. In upholding the program, the Court found that disabled students, not sectarian schools, are the primary beneficiaries of the government funded sign-language interpreter. *Id.* at 12. In this regard, the majority stated, "respondent readily admits, as it must, that there would be no problem under the Establishment Clause if the IDEA funds instead went directly to James' parents, who, in turn, hired the interpreter themselves." *Id.* at 13, n. 11. In their dissenting opinion, Justices Blackmun and Souter explored the facial differences between the type of aid upheld in *Mueller* and the provision of the sign-language interpreter. They acknowledged, however, that "[w]hen government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion." *Id.* at 22-23 (Blackmun, J., dissenting).

In 1995, the Court in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), held that a public university violates the Free Speech Clause of the

First Amendment when it refuses to allow student activity fees to be paid to third party printers of a student religious newspaper. Although the majority opinion focused on viewpoint discrimination, the Court also held that providing such assistance does not violate the Establishment Clause because the institution remains neutral toward religion. *Id.* at 839. Recognizing the shift in Establishment Clause jurisprudence wrought by *Mueller*, *Witters* and *Zobrest*, the Court noted, "[w]e have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends its benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.*

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court cited *Witters* and *Zobrest* in overturning earlier rulings prohibiting public school teachers from delivering compensatory education on sectarian private school campuses under a congressionally mandated program. Relying primarily on *Witters*, the Court determined that a neutral government program that provides benefits without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited does not violate the Establishment Clause. *Id.* at 234-35. Significantly, the Court modified the *Lemon* test by integrating the "entanglement" prong with the "primary effect" prong. The *Agostini* refinement to the *Lemon* test requires a secular purpose and primary effect that do not (1) result in government indoctrination, (2) define its recipients by reference to religion, and (3) create an excessive entanglement between government and religion. *Id.* at 234.

These modifications to the *Lemon* test were noted and applied by the Court in *Mitchell v. Helms*, 530 U.S. 793, 120 S.Ct. 2530 (2000), a case in which the Court upheld the use of Chapter 2 federal funds used to underwrite the

costs of computers, computer software, and other instructional materials in religious schools. The plurality opinion in *Mitchell* determined that no Establishment Clause violation would be found where government aid was channeled to religious institutions, even if such aid is used for religious purposes, provided the government program remained neutral towards religion. In this regard, the plurality opinion reasoned: "[i]f numerous private choices, rather than the single choice of a government, can determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." 530 U.S. at ___; 120 S.Ct. at 2541. In addition, the plurality observed that, "[p]rivate choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any government aid program, . . . and that could lead to a program inadvertently favoring one religion or favoring religious schools in general over non-religious ones." 530 U.S. at ___; 120 S.Ct. at 2541-2542.

The concurring opinion of Justice O'Connor, in which Justice Breyer joined, made similar observations on this point:

> When the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore wholly dependent on the student's private decision.

530 U.S. at ___; 120 S.Ct. at 2559. (O'Connor, J., concurring in part, dissenting in part). The controlling opinion of the Court thus recognizes the distinction between aid that reaches religiously sponsored schools "only incidentally as a result of numerous individual choices" and

direct aid. 530 U.S. at ___; 120 S.Ct. at 2584 (O'Connor, J., concurring in part, dissenting in part).

Last term, in *Good News Club v. Milford Cent. School*, 121 S. Ct. 2093 (2001), this Court further emphasized the central role that the principles of neutrality and private choice play in post-*Nyquist* Establishment Clause analysis. Indeed, these principles weighed heavily in the Court's rejection of an Establishment Clause-based defense raised by a public school to a Free Speech Clause claim predicated upon the school's exclusion of a Christian children's club from meeting after hours on school premises. With respect to the principle of neutrality, the Court made it clear that, "the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.' " *Id.* at 2104 (quoting *Rosenberger, supra,* at 839). As for the role of private choice in the Establishment Clause analysis, the Court wrote:

> [T]o the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee v. Weisman*, 505 U.S. 577, 592-593, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the Good News Club's religious activities. Milford does not suggest that parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

Id. at 2104.

The majority opinion of the Sixth Circuit written by Judge Clay considered most of these precedents, save *Good News Club*, which was handed down after the decision, in concluding that the Ohio Program is unconstitutional. *See* 234 F.3d at 954-957. The conclusion reached by the majority seems to acknowledge the significance of neutrality and private choice, but erroneously downplays the undeniably neutral design of the Ohio Program as well as the true choices the Ohio Program provides the scholarship pupils and their families.

II. THE SIXTH CIRCUIT IGNORED THE ROLES THAT NEUTRALITY AND PRIVATE CHOICE PLAYED IN THE DESIGN AND IMPLEMENTATION OF THE OHIO PROGRAM

The Ohio Program allocates scholarship and tutorial grants on the basis of secular, neutral criteria that neither favor nor disfavor religion. Grants are made on a non-discriminatory basis to low income families. The recipients are chosen by lottery. Moreover, grants are available to children who elect to remain in the public schools and to public school children who elect to enroll in alternative accredited schools. The low income recipients in turn make the choice of where to put that aid to use.

The unrefuted affidavits presented by Petitioners herein speak eloquently to the principles of neutrality and private choice. The scholarship or tutorial grants ultimately flow to public schools, secular non-public schools or religiously sponsored non-public schools only as a result of the genuinely independent and private choices of parents of the aid recipients.

A. Program Parents Whose Children Receive Grants Have a Wide Range of Choices and Are Able to Freely Choose the Option Best Suited to Address Their Children's Educational and Remedial Needs.

In his separate opinion, concurring in part and dissenting in part with the majority opinion, Circuit Judge

Ryan below properly identified the choices available to grant parents:

What are the choices Ohio has given these Cleveland parents?

(1) To permit their children to remain in the Cleveland public schools as before;

(2) To accept a tuition voucher for them to attend a Cleveland area nonreligious private school;

(3) To accept a tuition voucher for them to attend a Cleveland area religious private school;

(4) To accept a voucher for them to obtain special tutorial help in the Cleveland schools; or

(5) To accept a voucher for them to attend a public school in a district adjacent to Cleveland, although for the present these districts have declined to participate in the program. Ohio Rev. Code §§3313.976-3313.978.

234 F.3d at 968.

Unfortunately, the panel majority either ignored or disparaged each of these choice options by misconstruing the legislation creating the Ohio Program and by arriving at unwarranted, speculative factual conclusions contradicted by unrefuted affidavit evidence. In order to counterbalance the distorted view of the Ohio Program described by the Sixth Circuit panel majority, the following sections of this brief provide a more accurate description of the Ohio Program and the choices actually made by parents or guardians of children who attend the participating non-public schools.

1. Incentives for Adjacent Public School District Participation.

The Sixth Circuit erroneously asserted that "there is a financial disincentive for public schools outside the district to take on students via the school voucher program." 234 F.3d at 959. To be sure, in spite of statutory authorization, no adjacent public school has elected to participate during the pendency of this constitutional challenge. Without the benefit of any record evidence in this regard, the Sixth Circuit concluded that no adjacent public school is likely to enroll in the Program and attributes that likelihood to the manner in which the program was designed. 234 F.3d at 959. Based on the fact that public schools receive $7,097 per pupil, the Sixth Circuit assumed that the Program's maximum $2,250 voucher creates a financial disincentive for participation by adjacent public schools. There are, of course, multiple choices in addition to the potential adjacent public school choice. However, the majority erred when it concluded that the Ohio Program creates a financial disincentive for adjacent public school participation. The truth is that each child who enrolled in the adjacent public school would bring with him a voucher in the amount of $2,250, and the adjacent district would additionally receive the full amount of state aid attributable to that additional ADM (Average Daily Membership). Ohio Revised Code §3317.03(I)(1) specifically authorizes this additional funding:

> (I)(1) a school district admitting a scholarship student of a pilot project district pursuant to division (C) of §3313.976 of the Revised Code may count such student in its Average Daily Membership.

This means that the adjacent public school that participated in the Program would receive $2,250 over and above the baseline $4,500, which is the state support per Average Daily Membership. Thus, the adjacent public schools would receive three times the amount granted to

a family selecting a religiously affiliated non-public school. As important, since the adjacent public school districts have already addressed fixed costs, it follows that the variable or marginal cost of a scholarship child would more likely be substantially less than the $6,750 provided by the State. The Sixth Circuit's economic analysis thus skews the actual financial impact that would result from the participation of the neighboring public school districts in the Ohio Program.

2. Lower Scholarship Grants do not Favor Religiously Affiliated Non-Public Schools.

The Sixth Circuit also belittles the option to choose a secular non-public school by assuming that only religiously affiliated schools solicit sufficient outside contributions which enable them to accept the low income scholarship grant pupils. Many secular non-public schools have admirable missions and seek charitable contributions to reduce tuition needs. Their missions may indeed be identical though not religion based. Let's look for example at the Hanna Perkins School, one of the Petitioners herein. It has no religious affiliation. Affidavit of Thomas Barrett at ¶6; JA 194a-195a. During the 1999-2000 school year, one-third of its enrolled children were scholarship recipients. *Id.* at ¶3. That school has been attending to the needs of emotionally disabled and developmentally delayed children in the Cleveland community since 1951. *Id.* at ¶1. It is a non-profit 501(c)(3) corporation. *Id.* at ¶6. It seeks *United Way funds and other charitable contributions* to supplement its mission of helping troubled children. *Id.* at ¶5.

The affidavit of Charles Deblak, one of the founders of Birchwood School, appears at page 118a of the Appendix to the Petition for a Writ of Certiorari filed by The Hanna Perkins School, *et al.*, Petitioners. The Birchwood School was established in 1984 to provide an alternative high quality, non-religious education to elementary and junior high school students. *Id.* at ¶1. In addition to

tuitions and fees, the school receives *contributions from individuals and businesses. Id.* at ¶2. The school has a mission of developing strong character and a sense of responsibility in students. *Id.* at ¶5. These traits are developed through a challenging academic program and complimentary behavioral requirements. *Id.* Birchwood, which has no religious affiliation, makes up any shortfall in tuition receipts with contributions. Significantly, the primary source of its contributions is the business community. Contrary to the conclusions of the majority, the amount of the scholarship grant has not deterred this secular, non-public school from accepting scholarship pupils and participating in the Ohio Program.

The assumption by the majority that a $2,250 scholarship program deters participation by non-religiously affiliated private schools is further controverted by the affidavit of David L. Brennan, which appears in the Joint Appendix at pages 144a-148a. Brennan has been the CEO of numerous manufacturing companies and has a long-standing interest in the education of children in the Cleveland Public School District. *Id.* at ¶¶1-2. He wants to ensure appropriate education that will enable the children to become productive employees in manufacturing facilities. *Id.* at ¶2. Brennan established two secular private schools (the HOPE Academies) to participate in the Program. *Id.* at ¶¶2-3. In 1996, 350 parents chose to send their children to these two new academies. *Id.* at ¶4. Thereafter, the community school program recommended by the State Auditor in his Performance Audit was enacted. These community schools receive grants of $4,500 per student.[7] In paragraph three of his affidavit, Brennan affirms:

---

[7] R.C. §3314.03(11)(c) provides that each community school will "be nonsectarian in its programs, admission policies, employment practices, and all other operations and will not be operated by a sectarian school or religious institution."

> In 1998-99, HOPE Tremont Academy and HOPE Central Academy were two operating private schools, grades K-5. Students were funded under the Cleveland Scholarship and Tutoring Program (CSTP). In the spring of 1999, the Ohio Supreme Court had not yet decided about the constitutionality of the CSTP. Our parents were very anxious about the existence of the school for their children in September 1999. After consultation with the parents, it was decided to close the two voucher supported schools as of June 30, 1999, which was done. Two new community schools were formed to take over the premises as of July 1, 1999. Thus, the former students had the option of applying to other participating scholarship schools, or applying to new community schools to be open on the same premises. Many parents who previously sent their children to the two scholarship schools decided to enroll their children in the new community schools.

Id. at ¶3.[8]

The majority purposely overlooked the community school program out of a concern that the consideration of that program would "open the door to a wide reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program * * * ." 234 F.3d 958. Inasmuch as the majority found that the Ohio Program was "designed" in a manner calculated to attract religious institutions, 234 F.3d 961, it cannot assume the

---

[8] Brennan's affidavit testimony is borne out by Marilyn Hatcher, a parent whose child, Ebony, received a scholarship grant. Affidavit of Marilyn Hatcher, 6th Cir. JA pp. 1644-1645 (Vol. V). She first enrolled her child in Hope Central Academy a secular private school under the scholarship program. *Id.* She kept her child in that school after it converted to community school status.

legislative body was unaware of all other related programs affecting choice. Ohio's public schools are allocated $7,097 per pupil each year. A community school, which cannot be religiously affiliated, receives $4,500 per pupil per year. If an adjacent public school registered to participate in the Ohio Program, it would receive $6,750 per scholarship pupil each year. A pupil selecting a religiously affiliated non-public school would at best receive $2,250 per year. Given these disparate figures, how can this possibly be deemed a program that discriminates in favor of religious institutions?

3. The Program Requires the State Superintendent to Award Tutorial Assistance Grants to a Number of Students Equal to the Number Who Receive Scholarships.

The Sixth Circuit also failed to consider the tutorial assistance grants made available under the Ohio Program. These grants are awarded solely to qualified students who elect to enroll in the public schools. The majority below not only overlooked coexisting and related education choice programs (community schools), but ignored 50% of the choice options provided under the Ohio Program. R.C. §3313.978(B).

Pupils who elect to remain in Cleveland's public schools are entitled to receive tutorial assistance grants equal in number to scholarship grants for those who have selected alternative schools. Respondents have argued that they do not challenge the constitutionality of this half of the program and that the Courts should therefore sever it and evaluate the legislation as if it had never been included. Respondents' argument is at odds with this Court's repeated observation that resolution of Establishment Clause principles "depends on the hard task of judging – sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw a line sometimes quite fine based on the particular facts of

each case." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2526 (1995) (O'Connor, J., concurring). Respondents cannot be heard to assert that the lines should be drawn so that portions of legislative enactments might be evaluated in isolation. The decision of whether to enroll in an alternative, non-public school or take advantage of the tutorial grants while remaining enrolled in Cleveland's public schools is a key parental choice. This is particularly true since 50% of the qualified children opt for alternative schools while 50% remain in the public schools where they are eligible to receive the tutorial grants.

4. The Parents of the Scholarship Pupils Have Evaluated Alternatives and Chosen the One They Perceive Best Suited Their Children's Educational or Remedial Needs.

As stated in the Brennan Affidavit, JA 144a-148a, 350 alternative school parents selected the new secular, non-public HOPE schools. Others have selected one or more of the other ten remaining secular, non-public schools. The majority of families has chosen to register in one of the 46 remaining Catholic, Lutheran, other Christian or Islamic non-public schools.

The following affidavit evidence confirms that the parents of scholarship recipients have genuine choice alternatives and that those scholarship children who attend religiously affiliated, non-public schools do so only as a result of the independent and private choices of their parents:

a. Dawn Call is a disabled mother who lives on Social Security income. Affidavit of Dawn Call at ¶2; JA 190a-191a. She has enrolled her daughter as a scholarship student at Westpark Lutheran School. *Id.* Safety was a key factor in her choice process:

> I was quite happy when the Pilot Scholarship Program was announced. I attended public school in the Cleveland Public School District

> and my current disability is related to the unsafe conditions to which I was exposed in the Cleveland Public Schools. I want to ensure that my daughter is not exposed to the same unsafe environment.

Id. at ¶3.

b. **Pamela Bradley**'s daughter enrolled as a scholarship pupil in St. Francis School. Her choice was governed by the fact that:

> I interviewed other schools before selecting St. Francis. The reason I selected this school was that the staff seemed very competent, nice, friendly and respectful. I sensed a loving attitude and concern for children in the building.

Affidavit of Pamela Bradley at ¶2, Hanna Perkins Pet. App. at pp. 90a-91a. Ms. Bradley has noticed that her child has improved in reading and she attached the child's progress report to the affidavit to show how well she is doing in the alternative school. *Id.* at ¶3 and Attachment (Hanna Perkins Pet. App. pp. 92a-94a).

c. **Delories Jones** is a grandmother who has care of her two grandchildren, both of whom have been awarded scholarships under the Ohio Program. Affidavit of Delories Jones at ¶2; JA 186a-187a. Ms. Jones is single and retired and could not afford to pay tuition. *Id.* Her oldest grandson James T. attended Hanna Perkins School (no religious affiliation) as a scholarship pupil because he was developmentally delayed. *Id.* at ¶3. He received special treatment at Hanna Perkins which enabled him to successfully enroll at St. Jerome. *Id.* Her younger grandchild is a kindergarten student at Hanna Perkins. *Id.* at ¶4. He is more severely developmentally delayed. Ms. Jones explains:

> I am African-American and not a member of the Catholic faith. I selected St. Jerome School because of the educational structure and philosophy which is consistent with that to which he was exposed at Hanna Perkins (secular, non-

> public school). Before registering James, I visited St. Jerome School and learned as much as I could about the academic and student behavior programs.
>
> If the Scholarship Program ended, I would not be able to afford tuition for my grandchildren. Since both of them have very special needs, they would be lost if I tried to enroll them in the public school.

Id. at ¶¶5-6.

d. Adra Cleveland selected Metro Catholic School for her two scholarship pupils:

> I selected Metro Catholic School because I believed they would receive a better education in reading, writing and math. The school gives good individual attention to students that are weak in some areas; keeps the parents advised of progress.

Affidavit of Adra Cleveland at ¶2; Hanna Perkins Pet. App. pp. 97a-98a.

e. Jon Douthit selected Corpus Christi School for his two scholarship children because of their specific educational needs:

> I am a member of the Baptist church but have selected the Catholic sponsored school for my children because of their specific educational needs and because I concluded that they would best be met at Corpus Christi School * * * . I am very pleased with the Scholarship Program because it has enabled my oldest daughter to increase a whole grade level in math and I have seen major improvement in my younger daughter's spelling capabilities.

Affidavit of Jon Douthit at ¶1; Hanna Perkins Pet. App. pp. 127a-128a.

f. Tiffany Goodgame selected an alternative school for her daughter because: "[e]ven though we are not wealthy, I believe that my daughter deserves the chance

to have the best education possible and a chance for a better future." Affidavit of Tiffany Goodgame at ¶3; Hanna Perkins Pet. App. at pp. 133a-134a.

g. **Regena Hunter** explained her choice of an alternative school for her sixth grade scholarship student:

> I am a member of the Baptist faith and my children and I are African-Americans. I selected St. Francis School for my child because the moment I set foot in the school, I felt my child and his education was important to the entire staff. There are many differences between this school and my child's previous public schools. At the public schools my child often complained that there was no toilet paper or hand soap in the restrooms. In some of the classrooms, there were buckets to catch water dripping from the ceiling. The classes were overcrowded. He is receiving a much better education in math and reading than he did at the public school.

Affidavit of Regena Hunter at ¶1; Hanna Perkins Pet. App. pp. 139a-140a.

h. **Ann King-Eash** selected St. Mel School for her scholarship daughter. She explained:

> We are of course on an extremely tight budget and getting even more in debt. Without the Scholarship Program I could not have provided this quality education for my Scholarship child. I chose St. Mel because I wanted to get a good education for my daughter. I received proper information and also selected it because of its discipline, values and spirituality. St. Mel has a wonderful reputation for quality education. The school was highly recommended by other families.

Affidavit of Ann King-Eash at ¶1; Hanna Perkins Pet. App. pp. 152a-153a.

i. **Irma Pettway**, in discussing why she enrolled her son as a scholarship pupil at St. Vincent DePaul Catholic School, explained:

> There seems to be a lack of control in the public school system. There is poor academic material for the children and the safety level in the public schools is not satisfactory. I feel more comfortable about where my son is now and do not worry about him while he is at school. I have noted much better progress in spelling and physical education.

Affidavit of Irma Pettway at ¶3; Hanna Perkins Pet. App. pp. 165a-166a.

j. **Tammy Riggs** has enrolled her Scholarship children in St. Stanislaus School and prefers the alternative school because:

> I am pleased that the Scholarship Program enabled us to transfer from the public school because the children are better behaved here and the teachers are more patient with the children. My daughters are safe in school and prefer a school where children are permitted to pray.
>
> My one daughter has improved in almost every subject since she came to St. Stanislaus. In the second grade in public school, she had straight F's so we had her repeat second grade at St. Stanislaus. She has gradually raised her grades to A's and B's in some subjects and is doing much better.

Affidavit of Tammy Riggs at ¶¶3-4; Hanna Perkins Pet. App. pp. 169a-170a.

k. **Marcus Sims** has enrolled his two scholarship children in West Park Lutheran School because:

> The Scholarship Program gives low income families an opportunity to make education choices for their children that wouldn't otherwise be available. It gives me the opportunity to pick the right school for my kids. It gives them a chance to get a decent education, without distractions. I feel better about the smaller classroom size at this school. West Park Lutheran has a reputation

> of being one of the best private schools in the Greater Cleveland area. I would certainly recommend it to any disadvantaged household that wants to get a better education for their children. I certainly believe that West Park Lutheran has better educational programs in English and Spelling than the public schools.

Affidavit of Marcus Sims at ¶2; Hanna Perkins Pet. App. pp. 175a-176a.

l. **Yvette Thomas** enrolled her two scholarship children in St. Agatha-St. Aloysius School and explained:

> I chose this school after meeting with the Principals. Sr. Sandra won my heart with her pleasantness, sincerity, understanding, dedication and commitment.
>
> The scholarship school is preferable to public school because the school has more discipline, greater diversity, better safety and is family oriented.

Affidavit of Yvette Thomas at ¶¶3-4; Hanna Perkins Pet. App. pp. 183a-184a.

m. **Pamela Ward** enrolled her Scholarship daughter in Archbishop Lyke Catholic School:

> I selected this school because I had received recommendations as to the high academic quality. My child has improved in all of her academic subjects since she has been at Archbishop Lyke. Her greatest improvement has been in reading and math.

Affidavit of Pamela Ward at ¶3; Hanna Perkins Pet. App. pp. 185a-186a.

n. **Angela Grandberry** enrolled her son as a scholarship pupil at Luther Memorial School for academic and safety reasons:

> If the Scholarship Program is ended and I am unable to raise the necessary financial resources, I will likely home-school Byron. Going back to a

> Cleveland Public School would destroy all the good things that have been accomplished during the past three years. Not only will his academic progress be stunted, I would fear for the safety of my son.

Affidavit of Angela Grandberry at ¶9; JA 192a-193a.

o. **Kim Metcalf** is an associate professor at the Department of Curriculum and Instruction School of Education, Indiana University, and Director of the Indiana Center for Evaluation. Affidavit of Kim Metcalf at ¶1; JA 66a-72a. His organization conducted interviews to determine how and why educational choices were made by parents of scholarship recipients. *Id.* at ¶6, 9-12. Paragraph nine of his affidavit reflects his findings:

> Based upon interviews conducted in the spring of the third year of the program, the study examined how and why educational choices were made by parents. The most important reasons for applying for the scholarship program were educational quality and school safety.
>
> - 96.4% of the respondent's indicated that the fact that they believed that their private schools offered a better education than the public schools was either a very important or somewhat important reason for applying for a scholarship.
> - 84.6% indicated that public schools provided a "low quality education".
> - 78% reported a general dislike of the Cleveland public schools.
> - 95% of the respondents indicated that a concern for their child's safety was an important reason for applying for a scholarship.
> - 88.7% of the families applying for a scholarship indicated that financial reasons were very important or somewhat important in applying for a scholarship. The scholarship

was the only way they could send their child to a private school.

Id. at ¶9.

The foregoing affidavit testimony leaves little room for doubt about the nature of the truly private and independent choices made by the families of scholarship pupils.

5. The Majority of Pupils Benefiting Under the Ohio Program Attend Schools Without Religious Affiliation.

Three thousand seven hundred and sixty-one students received scholarships to enroll in alternative schools during the 1999-2000 school year. 234 F.3d at 949. Ohio Revised Code §3313.978 mandates that the State Superintendent award an equal number of tutorial assistance grants to qualified students enrolled in the *public* schools. Eighteen percent of the participating alternative schools are without religious affiliation. 234 F.3d at 949. Thus, less than 50% of the students who are the intended beneficiaries of the Ohio Program attend religiously affiliated schools. Or, put another way, the combined total of students who receive tutorial grants for use at public schools and students who use scholarship grants at non-public schools without religious affiliation exceeds 50%.

The statistical analysis favored by Respondents and the majority below fails to take these percentages into account. That analysis becomes quite suspect when one recognizes that the religiously affiliated alternative schools in the Cleveland District today are very different from the typical "profile" school examined by this Court in *Nyquist*. *See Nyquist*, 413 U.S. at 767-68. Besides, even with respect to the less than 50% of beneficiaries who received their benefits in religiously affiliated schools, parental and teacher affidavits reveal substantial variances from school to school concerning the role played by the religious sponsor in each school.

The profile of religiously affiliated non-public schools in *Nyquist* included schools: (1) that imposed

religious restrictions on admissions, (2) required obedience by students to the doctrines and dogmas of a particular faith, (3) imposed religious restrictions on faculty appointments and (4) imposed religious restrictions on what or how the faculty may teach. *Id.* The alternative schools participating in the Ohio Program are prohibited from discriminating on the basis of race, religion or ethnic background; provide admission priorities for the low income scholarship families; and must permit families to meet 10% of tuition requirements by providing in-kind contributions or services. The Ohio Program further mandates that no more than 50% of all scholarships awarded be used by students who were enrolled in a non-public school during the school year of application for a scholarship. R.C. §3313.975.

Undeterred by these features of the Ohio Program that safeguard neutrality, Respondents throughout this litigation have attempted to create a misleading impression of the extent to which religiously affiliated schools allegedly interweave religious beliefs with secular subjects.[9] They rely on religious mission statements, but ignore the specific and unrefuted affidavit evidence submitted by parents of children participating in the Ohio Program and by teachers from the various alternative schools.

The religiously affiliated alternative schools registered to participate in the Ohio Program have made accommodations for the fact that 62.5% of the scholarship pupils enrolled in the schools are not of the same religious faith as the sponsor. Affidavit of Carolyn Jurkowitz

---

[9] It should be noted that Ohio Revised Code §3313.602(B) requires Ohio public school districts to emphasize and discuss principles of ethics in all parts of grades kindergarten through twelve curriculum.

at ¶5; Hanna Perkins Pet. App. pp. 145a-149a. The following affidavit extracts reflect the extent of religious freedom and diversity and absence of proselytizing in these alternative schools:

a. **Marilyn Culler** is a member of the Lutheran church who teaches at St. Mel's Alternative School. Affidavit of Marilyn Culler at ¶1; Hanna Perkins Pet. App. pp. 105a-106a. She has never been asked to teach about the Catholic faith in her courses:

> I have not been asked to teach about the Catholic faith in my courses, but I am able to guide students towards the awareness of such virtues as self-discipline, work and perseverance which can be used in their daily lives. Virtues I try to inculcate can be used by Jewish, Muslim or Christian students alike.

Id. at ¶4.

b. **Adra Cleveland** is the mother of two scholarship pupils who have enrolled in Metro Catholic School. Affidavit of Adra Cleveland at ¶1; Hanna Perkins Pet. App. at pp. 97a-98a. She commented on the religious diversity in the school:

> I have not chosen a religious faith at the present time. I was brought up in the Jehovah Witness faith. I don't feel that this school pressures my children to accept the Catholic faith. The diversity in this school gives my children an opportunity to exercise choice. They can see and learn about religions and realize they have a free choice for schools and religion.

Id. at ¶4.

c. **Wendy Berning** is a not a member of the Catholic faith, but enrolled her son in St. Vincent DePaul Catholic School and does not experience any pressure to accept the teachings of that church:

> Neither I nor my children have felt any discomfort because we are not of the Catholic faith. We do not experience any pressure to accept the

> teachings of that church. I understood that this was a Catholic School when I selected it for my children. I selected the School knowing that religion was part of the program. The School has not overstepped in my opinion. The School reinforces the same gospel message that I teach at home. It reinforces values that should apply to everyone in society.

Affidavit of Wendy Berning at ¶3; Hanna Perkins Pet. App. pp. 86a-87a.

d. Willa Cloud, who enrolled her granddaughter in St. Vitus School, stated:

> St. Vitus has been very respectful of the fact that my granddaughter and I are Protestant. Tiffany participates in the choir and no one has any degree of disrespect for her being of a different religious faith. The diversity at the school gives her a better understanding of different religious faiths.

Affidavit of Willa Cloud at ¶5; Hanna Perkins Pet. App. pp. 99a-100a.

e. Sharon Cook, who is not a member of the Catholic faith, enrolled her son as a scholarship pupil at St. John Cantius School. Affidavit of Sharon Cook at ¶1; Hanna Perkins Pet. App. pp. 101a-102a. Her affidavit reveals:

> I have never been told that my son or I have to attend any Church devotional services. He is not made to feel bad if he elects not to participate. He is very comfortable in this school and I believe that he is getting the best education that will help him become a good person.

Id. at ¶5.

f. Diane Cover teaches at St. Ignatius Catholic School, which is enrolled as an alternative school in the Ohio Program. Affidavit of Diane Cover at ¶1; Hanna Perkins Pet. App. pp. 103a-104a. She is a member of the Congregational Protestant Church. The second paragraph in her affidavit confirms:

> I remain as a teacher at this school even though I could make more money elsewhere because I know I can make a difference in a child's life. I know my fellow teachers care more about the quality of education given to the children than the money they make. Neither the teachers nor the students not of the Catholic faith are required to participate in the devotional exercises. I can recall when one of our former Jewish teachers was teaching the 7th and 8th grade English. She was allowed to teach the students the customs and traditions of the Jewish faith. These students learned to understand and accept other religions because of her interaction with them.

Id. at ¶2.

g. Nicola L. Davies a member of the United Methodist Church who teaches at St. Vitus Catholic Alternative School. Affidavit of Nicola L. Davies at ¶1; Hanna Perkins Pet. App. pp. 116a-117a. Her affidavit recites:

> St. Vitus provides a diverse cultural and religious student body. There is no pressure on any of the children to accept or to adhere to doctrines of the Catholic faith. I am not certified to teach religion and I have not been requested to teach religion in my secular courses.

Id. at ¶2.

h. Robert Finkovich, who teaches at Metro Catholic Alternative School, addresses the subject of religious affiliation in his affidavit:

> I am not a member of the Catholic faith. I do not consider myself as belonging to any religious organization and do not have strong religious beliefs. This has not placed me in an uncomfortable situation even though I am teaching in a Catholic school. Approximately half of the teachers in our school are not of the Catholic faith.

> I have never been asked to teach religion in any of my courses and would not be in a position to do so.

Affidavit of Robert Finkovich at ¶¶2-3; Hanna Perkins Pet. App. pp. 129a-130a.

i. **Kathryn Gibson** is a member of the United Church of Christ who teaches at St. Patrick West Park Alternative School. Affidavit of Kathryn Gibson at ¶1; Hanna Perkins Pet. App. pp. 131a-132a. Paragraphs four and five of her affidavit recite:

> I am not asked to participate in religious service unless I choose to do so. Other staff members and I share our experiences concerning various religious faiths and everyone is very open minded and accepting of differences and diversity.
>
> There is no pressure to teach religion in the State-required secular courses.

Id. at ¶¶4-5.

j. **Regena Hunter** is a member of the Baptist faith and enrolled her child as a scholarship pupil at St. Francis School. Affidavit of Regena Hunter at ¶1; Hanna Perkins Pet. App. pp. 139a-140a. Her affidavit comments upon religious diversity in that alternative institution:

> There has been no pressure upon me or my child to alter our religious beliefs. My child has learned how Catholics worship and compares that to ours. It has enriched his own religious beliefs. It has improved his respect for all people of different ethnic and religious background. The teachers at St. Francis School respect my beliefs and have encouraged the parents at the school to continue to take our children to our respective places of worship on a regular basis.

Id. at ¶2.

k. **Lynette Greene** teaches scholarship pupils at Calvary Center Academy. Affidavit of Lynette Denise Greene at ¶1; Hanna Perkins Pet. App. pp. 135a-136a. She

explains that their goal is to instill Christian values and enable the children to become better law abiding citizens:

> My faith tradition is Apostolic and I am an African-American. I have chosen to teach at Calvary Center Academy because I am able to teach Christian values as well as the state required secular curriculum. At Calvary we assist parents by instilling Christian values that will enable their children to become successful law abiding citizens.

Id.

l. **Raymond Alex Jones** is an Episcopalian who teaches at St. Catherine/Archbishop Lyke Alternative School. Affidavit of Raymond Alex Jones ("Jones Aff.") at ¶1; Hanna Perkins Pet. App. pp. 142a-144a. Ninety percent of the pupils enrolled in that school are not of the same religious faith as the sponsor, and the curriculum and philosophy is designed to meet the needs of heavy minority enrollment. *See* Jurkowitz Aff. ¶4; Hanna Perkins Pet. App. pp. 145a-149a. Mr. Jones' affidavit addresses his teaching preferences:

> I like to teach children how math, science and reading are not isolated subjects, but are interconnected. For example, we explored Black History by visiting Africa through reading traditional African folktales that illustrate the seven principles Nguzo Saba (See Attachment to this Affidavit). We learned traditional Black/African folksongs. We make masks to go with these traditional Black/African folksongs dances. We study African/Egyptian alphabet and Number systems, Geometry, etc.
>
> I am not required to teach religion to the children. The school tries to hire good Christians who will teach, lead the children through example, not by forcing anything down anyone's throat.

Jones Aff. ¶¶3-4.

m. Julie Keen, a member of the Presbyterian faith who teaches at St. John Cantius Alternative School, points out:

> Approximately one-fourth of our pupils at St. John Cantius are not of the Catholic faith.
>
> I have never felt differently while teaching at this Catholic school because of my different religious belief. No one has made any effort to cause me to participate in Catholic traditions. I believe this school accepts and welcomes diversity in all students and faculty.

Affidavit of Julie Keen at ¶¶2-3; Hanna Perkins Pet. App. pp. 150a-151a.

n. Dana Martin is a single mother who works nights and who registered her daughter as a Scholarship pupil at Holy Name Elementary School. Affidavit of Dana Martin at ¶1; Hanna Perkins Pet. App. pp. 154a-155a. She is a member of the Baptist (Missionary) faith. *Id.* at ¶2. She learned that she lost her scholarship because of her move outside the school district. *Id.* at ¶1. She affirms that if she can't regain the scholarship, she will make financial sacrifices necessary to pay her daughter's tuition so that she can remain in a school that provides quality education and stresses sound fundamental values. *Id.*

Ms. Martin's testimony confirms that the individual student recipients and their families are the true beneficiaries of the Ohio Program. With her move outside the district, her daughter lost a state grant that paid 90% of her tuition. When Ms. Martin decided that her child would remain in the same school but pay tuition, she had to make an additional financial sacrifice and budgeted a greater portion of her salary to cover educational costs. If her daughter remained as a scholarship pupil, the school would receive her scholarship check equal to 90% of the tuition. If she lost the scholarship and paid all of her daughter's tuition, the school would receive the full tuition directly from her.

Ms. Martin appreciates the religious diversity in the alternative school:

> Sharae does attend religion classes and when she does so, she and I talk about the differences between our faith and the Catholics. She discusses these differences the next day in class and this is an example of the continued diversity that exists at Holy Name. I want my daughter to be able to associate with all walks of life and to grow up knowing that people are different and that the differences make each one of us an individual and special.

Id. at ¶4.

o. **Rhonda Rutkowski** is a member of the Lutheran faith who teaches at Our Lady of Peace Alternative School. Affidavit of Rhonda Rutkowski at ¶1; Hanna Perkins Pet. App. pp. 171a-172a. She distinguishes between the formation of fundamental Christian values and the inculcation of theological values:

> I have never been asked to teach the tenets of the Catholic faith to my students, but I do try to help the students form fundamental Christian values such as honesty, integrity and respect for others. I have never felt pressured to accept the faith tradition of this school.
>
> My own faith is respected. If the Sunday Masses involve school activities I have never been told to attend those Sunday Masses.

Id. at ¶¶2-3.

p. **Irene Sanchez** is a member of the Protestant faith who has enrolled her children in St. Rocco Alternative School. Affidavit of Irene Sanchez at ¶1; Hanna Perkins Pet. App. pp. 173a-174a. The second paragraph of her affidavit recites:

> I selected St. Rocco School because I knew that my son would receive more attention and a better education. He is doing very well in school. We haven't felt any pressure or discomfort because we are not of the same religious

> faith as the school. My son isn't pushed into doing anything and religion is not pushed onto anyone. If you are not Catholic, you are excused from Holy Communion and other religious instructions.

Id. at ¶2.

q. **Marcus Sims** has enrolled his two scholarship children in West Park Lutheran School. Affidavit of Marcus Sims at ¶1; Hanna Perkins Pet. App. pp. 175a-176a. He is not a member of the Lutheran faith and denies any pressure to become such:

> Neither I nor my children have felt any pressure or suggestions to convert to become Lutherans. My kids have never come home confused about anybody's beliefs or practices and they are getting a fine education that will help them to become better citizens.

Id. at ¶3.

r. **Yvette Thomas** is a member of the Baptist church who has three children enrolled as scholarship pupils at St. Agatha – St. Aloysius School. Affidavit of Yvette Thomas at ¶1; Hanna Perkins Pet. App. pp. 183a-184a. Her affidavit addresses the subject of religious diversification:

> Although St. Agatha – St. Aloysius School is not of our faith, the student body is highly diversified in terms of religious beliefs. The children are made aware that there are more religious versions than one. Although there is religious diversity, the school teaches things that all religions should teach, such as family unity and that "family unity" makes a community strong. We do have a strong school community consisting of students, teachers, parents and the sponsoring Parish. My children were baptized as Baptists recently. They announced this at the school and everyone was happy and overjoyed for them. There has never been any effort to

> change my children's views about their Baptist religion.

Id. at 6.

s. **Marija Yovich** is a teacher at St. Mary Byzantine Alternative School, but is not a member of the Byzantine faith. Affidavit of Marija Yovich at ¶1; Hanna Perkins Pet. App. pp. 187a-188a. Her observations are:

> From what I have observed, all of the different religious denominations are respected equally at this school.

Id. at ¶5.

Respondents will of course continue to cite from portions of the school mission statements and attempt to describe the Cleveland District alternative schools as proselytizing institutions which inculcate theological tenets into all secular courses and require obedience to doctrines and dogmas of the sponsoring faith. That may indeed have been the goal of the religiously affiliated schools under scrutiny in *Nyquist*; however, it would be unfair and inaccurate to attempt to categorize the alternative schools in the Cleveland District in that fashion. The foregoing extracts from parent and teacher affidavits accurately portray how scholarship pupils of varying religious faiths or lack of same are integrated into the non-public schools and taught to become better citizens.

Are the religiously affiliated non-public schools registered to participate in the Ohio Program truly religious? Of course they are. They have prayer, religious symbols, devotional exercises, and seek to instill strong fundamental values. The extent to which each individual school accommodates scholarship pupils of differing faiths varies even among schools of the same sponsorship. There is no standard profile among these unique inner-city schools.

The varying relationships between religious mission and secular education may not be particularly relevant when considering a program that provides neutral benefits without reference to religion and permits parents to

make a free and independent choice among religiously affiliated and secular institutions. In such circumstances it would be difficult to conclude that a school would be disqualified from participation in the Ohio Program if it had students recite three prayers a day rather than one, if it displayed 20 religious symbols rather than five, or if it provided optional devotional exercises once a week, once a month or every day.

The foregoing extracts from affidavits are not portrayed to suggest that any particular formula for religiosity or lack thereof should be determinative of the Establishment Clause challenges. On the other hand, because Respondents and the majority below have attempted to improperly portray excessive religious permeation in these schools, fairness and accuracy should be the order of the day. The parents and teachers are in the best position to discern what is taking place in their classrooms, and their affidavits refute the atmosphere of excessive religious pervasiveness alleged by Respondents.

III. *NYQUIST* SHOULD NOT CONTROL THE CONSTITUTIONAL ANALYSIS OF THE OHIO PROGRAM.

The Sixth Circuit erroneously concluded that the legislation at issue in this case is practically identical to that before the Court in *Nyquist*: "[w]e find that *Nyquist* governs our result. Factually, the program at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*." 234 F.3d at 958. This quote reflects a total misunderstanding of both the *Nyquist* and Ohio programs. As an initial matter, the Court in *Nyquist* acknowledged that the New York program was designed to resolve financial problems in

the *non-public* schools. On the other hand, the Ohio Program was adopted to respond to an educational crisis in the *public schools*.

The Ohio Program applies to all children from low-income families without regard to religious persuasion or belief. The *Nyquist* program permitted public school children to participate only if they were of the same religious faith as the selected non-public school (the New York non-public schools at that time "imposed religious restrictions on admission"). *Nyquist*, 413 U.S. at 768-69. Thus, if a public school child wanted to use his tuition grant to enroll in a non-public school, he could do so only if he was a member of the religious organization sponsoring that school.

The difference between the Ohio and *Nyquist* programs becomes even more striking when one considers the nature of the religiously sponsored schools in New York in the early 1970's. The profile considered by the Court addressed non-public schools that: (1) imposed religious restrictions on admissions; (2) required students to obey the doctrines and dogmas of a particular faith; and, (3) imposed religious restrictions on faculty appointments. *Id.* at 769. Throughout this litigation, Respondents have pointed out that these findings were just profiles rather than actual findings in the *Nyquist* case. However, that position ignores the statement in the *Nyquist* Court's opinion to the effect that:

> Although no record was developed in these cases, a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. The District Court, *relying on findings in a similar case recently decided by the same court* adopted a profile of these sectarian, nonpublic schools similar to the one suggested in the plaintiffs' complaint.

Id. at 767, 768. (emphasis added).

There isn't a single religiously affiliated school registered to participate in the Ohio Program that would come

within this profile. The Ohio legislation specifically prohibits admission discrimination based on religion. R.C. §3313.976(A)(4). As a matter of fact, it requires admission preference to Scholarship pupils. R.C. §3313.977. It is also noteworthy that the Ohio Supreme Court specifically struck a provision in the legislation which could be considered to have allowed a secondary religious preference in admission. *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 211 (1999). That provision was eliminated when the present statute was enacted.

Because Plaintiffs make specific reference to the number of non-public schools in the program that are sponsored by the Catholic Church, it is significant to point out that 62.5% of the Scholarship children enrolled in the registered Catholic schools are not of the Catholic faith. Jurkowitz Affidavit at ¶5; Hanna Perkins Pet. App. pp. 145a-149a. Thus, unlike *Nyquist*, this is not a program designed to help Lutherans attending Lutheran schools, Catholics attending Catholic schools, Baptists attending Baptist schools or Episcopalians attending Episcopal schools. This is a pilot project designed to help poor Cleveland District children who are suffering the effects of a debilitating educational crisis. The parent Affidavits cited throughout this brief confirm that needy families are receiving scholarships without regard to their religious faith and without regard to the religious identity of the school sponsor. *See, supra*, at pp. 36-44. Respondents have undoubtedly adopted from *Nyquist* the suggestion that these scholarship monies were unrestricted and could be used to buy religious icons. That was true in *Nyquist*, but this again illustrates the importance of the distinctions between *Nyquist* and the Ohio Program. In *Nyquist*, the non-public schools continued to educate the same previously enrolled students in the same fashion. They simply received extra money for doing so. All existing non-public students received the grant and tuitions could simply increase in the amount of the grant. Ohio

law prevents such. R.C. §3313.976(A)(8). The *Nyquist* schools ended up with more money for doing the same thing. On the other hand, under the Ohio Program, the registered non-public school does not receive extra money for teaching the same pupils in the same manner. In order to qualify, the school *admits new pupils* who, as the affidavits reveal, typically are behind grade level and require additional remedial assistance (more cost). R. 34 Hanna Perkins Opp. to TRO Exh. 1 pg. 2, 6th Cir. JA pg. 256. Once the parent chooses the non-public school and the scholarship payment becomes available, the payment is less than the cost assumed by the registered school to educate the student. R. 34 Hanna Perkins Opp. to TRO Exh. 1 pp. 2, 3, 6th Cir. JA pp. 256, 257. In other words, there are no newfound monies to spend in an unrestricted fashion.

Respondents undoubtedly will continue to quarrel with distinctions between *Nyquist* and the Ohio Program put forth by Petitioners herein. However, they cannot credibly quarrel with a similar distinction drawn by the U.S. Supreme Court in *Mueller v. Allen*, 463 U.S. 388, 398 (1986):

> In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in *non public* schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that '[i]n both cases, the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools.' * * * [10]

---

[10] *Mueller* cannot be distinguished because it involved tax relief rather than grants. *Nyquist* itself saw no practical distinction: "In practical terms, there would appear to be little

See also Agostini, 521 U.S. at 226; *Zobrest*, 509 U.S. at 1; *Witters*, 474 U.S. at 488.

The lower court also relied heavily upon statistical evidence concerning the number of children enrolling in religiously sponsored institutions in a specific year. The *Mueller* Court rejected that sort of analysis:

> We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief.

463 U.S. at 401.

Although the Sixth Circuit determined that *Nyquist* should directly control the outcome in this case, the U.S. Supreme Court in *Mueller* found that the question of whether a program such as this meets Establishment Clause constraints was specifically reserved in *Nyquist*. 413 U.S. at 390. In distinguishing these kinds of cases involving facially neutral statutes from *Nyquist*, the U.S. Supreme Court in *Mueller* specifically referred to footnote

---

difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under Section 2." 413 U.S. at 790, 791. *See also Mueller* 463 U.S. at 405 (Marshall, J., dissenting).

38 in *Nyquist*. The many fundamental distinctions between the Ohio Program and the New York program in *Nyquist* become even more relevant in light of the evolution of post-*Nyquist* Establishment Clause jurisprudence discussed above. In the post-*Nyquist* era, the extent to which government programs are made available to public and non-public school families without regard to religion has become the paramount focus of constitutional inquiry. In this case, the Ohio Program's adherence to the dictates of *Mueller, Witters, Zobrest, Rosenberger, Mitchell* and *Good News Club* is unmistakable. Accordingly, contrary to the majority's conclusion below, *Nyquist* no longer controls the proper First Amendment analysis. Under the prevailing constitutional analysis, the Ohio Program fully comports with the Establishment Clause.

CONCLUSION

For the foregoing reasons, the Hanna Perkins School, et al., Petitioners respectfully request that this Honorable Court reverse the judgment of the Sixth Circuit.

Of Counsel:

DAVID J. HESSLER
NATHAN E. HESSLER
WEGMAN, HESSLER & VANDERBURG
6055 Rockside Woods Boulevard
Suite 200
Independence, Ohio 44131

DAVID J. YOUNG
(Counsel of Record)
MICHAEL R. REED
PAUL A. WOLFLA
SQUIRE, SANDERS & DEMPSEY L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2700

Counsel for Petitioners Hanna Perkins School, et al.